CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

KITSAP CITIZENS FOR RESPONSIBLE PLANNING and JERRY HARLESS Petitioners, v. KITSAP COUNTY, Respondent, and OPG PROPERTIES, LLC, Intervenor and HOME BUILDERS ASSOCIATION OF KITSAP COUNTY, *et al*., *Amici Curiae*	)	**Case No. 06-3-0007** ***(KCRP VI)*** **FINAL DECISION AND ORDER**

SYNOPSIS

*Petitioners Kitsap Citizens for Responsible Planning and Jerry Harless challenged Kitsap County's adoption of Ordinance No. 352-2005 which amended the Kingston Sub-Area Plan, an element of the County's Comprehensive Plan, and associated development regulations. The Ordinance expanded the Kingston Urban Growth Area (**UGA**) to accommodate a new 2025 population target. Petitioners contended that the County failed to conduct a mandatory ten-year UGA update prior to expanding the Kingston UGA; that the County did not implement reasonable measures to accommodate expected urban growth before resorting to an expansion of the UGA; that the County utilized a non-compliant Urban Land Capacity Analysis as a basis for expanding the UGA, which resulted in an excessively oversized UGA; that the County failed to provide urban services adequate to support planned growth; and that the actions of the County substantially interfered with the goals of the GMA, justifying a finding of invalidity.*

The Board found that adoption of the Kingston Sub-Area Plan expanding an individual UGA prior to the ten-year review of the County's UGAs, county-wide analysis and

collective consideration to accommodate the full 2025 population target did not comply with RCW 36.70A.130(3) and .115 and GMA Goals .020(1) and (2).

The Board found that expansion of the Kingston Sub-Area UGA in advance of adoption of "reasonable measures" did not comply with RCW 36.70A.215 [noting, however, that the Thurston County Superior Court ruling that found Kitsap County's measures not reasonably likely to produce the desired outcomes was issued one day after Kitsap's adoption of the Ordinance challenged here].

The Board found that expansion of the Kingston UGA also failed to comply with the goals and requirements of RCW 36.70A.110, .070(3), .020(1) and (12) concerning provision of urban facilities and services, in that the expansion was based on a Land Capacity Analysis that discounted un-serviced areas of the existing UGA and a Capital Facilities Element lacking plans to provide services to the existing UGA within the 20-year planning period. The Board found other discount factors in the Land Capacity Analysis were within the County's discretion, were tailored to local circumstances, and were balanced by reductions in the "market factor" discount applied by the County.

The Board did not issue an Order of Invalidity; rather, the Board recognized the County's efforts in performing its ten-year UGA review and remanded Ordinance No. 352-2005 to the County with direction to take legislative action to comply with the GMA as set forth in this Final Decision and Order.

I. BACKGROUND[1]

On February 17, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kitsap Citizens for Responsible Planning and Jerry Harless (**KCRP** or **Petitioners**). The matter was assigned Case No. 06-3-0007, and is hereafter referred to as *KCRP VI*. Board member Bruce Laing is the Presiding Officer for this matter.[2] Petitioners challenge Kitsap County (**Respondent** or **Kitsap** or **County**) adoption of Ordinance No. 352-2005 (the **Ordinance**), which amended the Kingston Sub-Area Plan and corresponding development regulations, as not in compliance with the Growth Management Act (**GMA** or **Act**).

In March, 2006, Petitioners filed a timely Amended Petition for Review, restating the legal issues in the case. OPG Properties LLC [**OPG** or **Intervenors**] filed a Motion to Intervene on behalf of Kitsap County. Kitsap County filed Respondent's Index of the Record.

The Prehearing Conference was conducted on March 28, 2006, in the Fifth Floor Conference Room, Union Bank of California Building, 900 Fourth Avenue, Seattle. At the prehearing conference, Respondent Kitsap County requested an early Hearing on the

[1] The complete procedural history of this matter is contained in Appendix A.

[2] Board member Bruce Laing's term of office expired on June 30, 2006, and was extended by Governor Gregoire to July 31, 2006.

Merits to accommodate the schedule of the County's attorney. Accordingly, the schedule for motions practice was merged with the schedule for briefing on the merits.

On March 31, 2006, the Board issued its Prehearing Order and Order on Intervention (**PHO**), which granted intervenor status to OPG and set the case schedule.

On April 4, 2006, the Board received the requested core document: 2005 Final Kingston Sub-Area Plan Update, dated December 21, 2005 (Attachment 1 to Ordinance No. 352-2005). A portion of Appendix C of the Core Document was inadvertently omitted. This material was requested by the Board at the Hearing on the Merits and submitted by Kitsap County on June 14, 2006.

All briefs were timely filed as follows:

- Petitioners' Prehearing Brief with five exhibits [**KCRP PHB**]
- Petitioners' Motion to Supplement with three exhibits.
- Respondent Kitsap County's Prehearing Brief [**County Response**] with 22 exhibits and the accompanying Declaration of Michael J. Michael and Declaration of Barry Loveless.
- Kitsap County's Response to Motion to Supplement, agreeing to the inclusion of two items and objecting to the third.
- Intervenor OPG Properties LLC's Prehearing Brief [**OPG Response**] with 8 exhibits.
- Motion of Home Builders Association of Kitsap County [**HBAKC**] and Kitsap County Association of Realtors [**KCAR**] for Leave to File an *Amicus Curiae* Brief [***Amicus* Motion**], "*Amicus Curiae* Brief of Home Builders Association of Kitsap County and Kitsap County Association of Realtors" [***Amicus* Brief**], and "Declaration of Art Castle, Executive Vice President for the Home Builders Association of Kitsap County." *Amici* propose to address only Legal Issue No. 4.
- Petitioners' Response to HBAKC/KCAR *Amicus Curiae* Motion and Motion to Strike." Petitioners do not object to the participation of HBAKC and KCAR as *Amicus* but move to strike the twelve exhibits attached to the Declaration of Art Castle and any portions of the *Amicus* Brief and *Amicus* Motion based on those exhibits.
- Petitioners' Reply Brief (**KCRP Reply**) with three exhibits.

The Hearing on the Merits was convened on June 12, 2006, in the Training Center adjacent to the Board's Offices. Present for the Board were Board members Edward G. McGuire, Margaret A. Pageler, and Presiding Officer Bruce C. Laing. Board law clerk Julie Taylor and Board extern Kris Hollingshead also attended. Petitioners were represented by Jerry Harless, with KCRP member Charlie Burrow in attendance. Respondent Kitsap County was represented by Deputy Prosecuting Attorney Shelley E. Kneip, accompanied by Scott Diener and Katrina Knutson, both planners with Kitsap County. Intervenor OPG Properties, LLC was represented by Charles Maduell of Davis Wright Tremaine, LLP. Art Castle, Executive Vice President of Home Builders

Association of Kitsap County also attended. Eva P. Jankovits of Byers & Anderson, Inc., provided court reporting services.

The Hearing on the Merits was convened at approximately 10:00 a.m. and adjourned at approximately 12:35 p.m. The Board ordered a transcript of the proceedings. The transcript of the Hearing on the Merits was received on June 19, 2006, and is referred to herein as **HOM Transcript.**

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also,* RCW 36.70A.300(1).

Petitioners challenge the County's adoption of Ordinance 352-2005, adopting the Kingston Sub-Area Plan and development regulations. Comprehensive plans and development regulations, and amendments thereto, adopted by Kitsap County pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioners to demonstrate that the actions taken by the County are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [Kitsap County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find Kitsap County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Kitsap County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound*

Growth Management Hearing Board (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005).

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, MOTION TO SUPPLEMENT, AND *AMICUS* MOTIONS

A. BOARD JURISDICTION

The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the challenged ordinance, which amends the County's comprehensive plan and development regulations for the Kingston Sub-Area, pursuant to RCW 36.70A.280(1)(a).

B. SUPPLEMENTATION OF THE RECORD

RCW 36.70A.290(4) provides in part:

> The board shall base its decision on the record developed by the [jurisdiction] and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

By agreement of the parties in this case, the Board scheduled the deadlines for filing motions and responses concurrent with the filing of Petitioners' and Respondent's briefs. The PHO indicated there would be a few minutes for oral argument on motions at the outset of the Hearing on the Merits. PHO, at 4.

On May 15, 2006, the Board received Petitioners' Motion to Supplement the Record with three attachments labeled Exhibit A, Exhibit B and Exhibit C. On May 26, 2006, the Board received Kitsap County's Response to Motion to Supplement stipulating to the admissibility of Exhibits A and B, but objecting to Exhibit C. Kitsap indicated Exhibits A and B are in the record under Index Nos. 28110 and 28130 respectively. After hearing argument at the HOM, the Board made the following oral rulings on the exhibits:

- Exhibit A – An email dated November 20, 2005 from Annie Humiston with a subject heading "Re: Kingston Sub –area plan" stamped "Received Nov 22 2005

Kitsap County Dept of Community Development." **Admitted under Index No. 28110.**

- Exhibit B – A letter dated November 22, 2005 from Betsy Cooper with three exhibits stamped "Received Nov 22 2005 Kitsap County Dept of Community Development." **Admitted under Index No. 28130.**

- Exhibit C – County report titled "Residential Construction." **Admitted as Supplemental Ex. 1.**

On June 6, 2006, the Board received Petitioners' Reply Brief with three attachments labeled Exhibits A through C. Kitsap County objects to the admission of Exhibit C but does not object to Exhibits A and B. After hearing argument at the HOM, the Board made the following oral ruling:

- Exhibit A – Thurston County Superior Court cases 04-2-02138-1/05-2-01564-8/05-2-01678-4 "Decision of the Court following Trial held December 2, 2005." **Admitted as Supplemental Ex. 2.**

- Exhibit B – Washington Supreme Court No. 78224-5, Kitsap County's Answer to Respondents' Motion to Extend Time to File Respondents' Brief. **Admitted as Supplemental Ex. 3.**

- Exhibit C – "Kingston UGA, Alternatives 1, 2 and 3" map from www.mykitsap.org, the County's ten-year UGA update website. **Admitted as Supplemental Ex. 4.**

The Board will give these supplemental items the weight to which they are entitled.

C. GRANTING *AMICUS* and GRANTING MOTION TO STRIKE

WAC 242-02-280 provides as follows:

> (1) Any person whose interest may be substantially affected by a proceeding before a board may by motion request status as an *amicus* in the case.
> (2) A motion to file an *amicus curiae* brief must include a statement of:
> (a) Applicant's interest and the person or group applicant represents;
> . . . and
> (d) Applicant's reason for believing that additional argument is necessary on these specific issues. The brief of *amicus curiae* may be filed with the motion but must be filed no later than the time set for the filing of the brief for the party whose position the *amicus* supports.
> (3) If the person qualifies for *amicus*, the presiding officer may impose conditions upon the *amicus's* participation in the proceedings, either at the time that *amicus* status is granted or at any subsequent time.

HBAKC and KCAR have requested leave to participate as *amicus curiae* with respect to Legal Issue No. 4 in the PFR of CPSGMHB Case No. 06-3-0007. HBAKC and KCAR propose to focus on "the arguments presented by [Petitioner] KCRP on the Land Capacity Analysis." HBAKC and KCAR assert that they provide "a perspective that is not represented by the current parties to the action," in that Intervenor OPG is a developer focused on the effects of the Kingston Sub-Area Plan on the Arborwood project, while the County lacks the "perspective of a builder, developer, or realtor."

Petitioners did not object to the participation of HBAKC and KCAR as *Amici* but moved to strike the twelve exhibits attached to the Declaration of Art Castle and any portions of the *Amicus* Brief and *Amicus* Motion based on those exhibits.

The Board finds that the motion and brief were timely filed and that HBAKC and KCAR have an interest and expertise in the matter that is not represented by current parties. The Board hereby **grants** the motion for *amicus* status.

The Board reviewed the challenged exhibits to the Declaration of Art Castle. The exhibits provide Art Castle's analyses of development trends in Kitsap County. Virtually all the exhibits have dates subsequent to the County's enactment of the challenged ordinance and, by definition, are not in the County's record. Additionally, the exhibits do not materially contribute to the argument in the *Amicus* Brief (only one of the exhibits receives a single mention in the brief – *Amicus* Brief, at 4, fn. 9). The Board finds that the information contained in the exhibits is not "necessary or of substantial assistance" to the Board in resolving Legal Issue No. 4.[3]

The Board **grants** the motion to strike Exhibits A-L to the Declaration of Art Castle and the portion of the *Amicus* Motion based on those Exhibits [*Amicus* Motion, at 4, fn. 9].

IV. THE CHALLENGED ACTION AND CONTEXT

On December 19, 2005, Kitsap County adopted Ordinance No. 352-2005 (the **Ordinance**) which amended the Kingston Sub-Area Plan and corresponding development regulations. The Kingston Sub-Area Plan amendments added 366 acres to the Kitsap Urban Growth Area (**UGA**), on the south and west, and was designed to accommodate a population projection out to 2025. Ordinance, at 4-6. Of the land added to the Kingston UGA, 337 forested acres are known as Arborwood and owned by Intervenor OPG. *Id.*

Arborwood has a plat vested at one unit per acre. Ordinance No. 352-2005 provides that Arborwood will withdraw vesting of the plat upon signing of a development agreement that provides Urban Cluster Residential zoning on a portion of the property, after dedication of 104 acres to provide open space and protection of wetlands. Ordinance, at

[3] Mr. Castle's exhibits provide the kind of factual analysis this Board welcomes; however, the exhibits do not appear to be directly germane to the LCA methodology challenged in Legal Issue No. 4.

10-11. Development in the UCR zone will average 5 du/acre, with total dwelling units not to exceed 751. *Id.;* see also Index 28404.

A previous Kingston Sub-Area Plan, adopted by Kitsap County in 2003 and found compliant with the GMA by this Board in *City of Bremerton, et al., v. Kitsap County [**Bremerton II**]*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 43-46, added 400 acres to the Kingston UGA on the north and west, and was designed to accommodate a 2017 population increase of 640, plus incorporate several large parks and school district properties. *See*, Index 25559, 24387, 24629. The *Bremerton II* decision also upheld expansions of the UGA in two other parts of the County based on sub-area plans.

In *Bremerton II*, certain petitioners [Suquamish Tribe, et al.] argued that the County had violated the GMA by expanding its UGA through sub-area plans despite the finding of its Buildable Lands Report that there was sufficient capacity within existing UGAs to accommodate projected growth. *Bremerton II*, at 48. These petitioners also asserted that pursuant to RCW 36.70A.215(1)(b) the County must adopt and implement "reasonable measures" – measures reasonably likely to increase the consistency between the County's growth policies and actual development on the ground – "other than adjusting urban growth areas." In *Bremerton II*, the Board opined that "reasonable measures" were required, but dismissed the issue as not yet ripe. The Board applied the December 1, 2004 deadline established in .130(4) as "the outside limit for a local government to adopt reasonable measures to avoid the need to adjust the UGA," and concluded that "[t]he County has until December 1, 2004 to discharge this GMA obligation and duty." *Bremerton II*, at 55.

Because the December 1, 2004, date was based on the statutory requirement for ten-year county-wide reviews of UGAs, Kitsap moved for reconsideration, arguing that the ten-year review was not an issue in the case and that Kitsap should be held to a different schedule. In its Order on Reconsideration (*Bremerton II*, Sept. 16, 2004), the Board reaffirmed its dismissal of the Petitioners' challenge as untimely.

Shortly thereafter, the County adopted Resolution No. 158-2004 appending a list of previously-enacted development regulations which it identified as "reasonable measures." In *1000 Friends/KCRP v. Kitsap County [**1000 Friends**]*, CPSGMHB Case No. 04-3-0031c, Final Decision and Order (June 28, 2005), Petitioner Jerry Harless challenged Resolution 158-2004 as insufficient to meet the .215 requirement and also challenged the County's failure to conduct the ten-year UGA review and update required under .130. The Board deferred to the County's discretion in its identification of reasonable measures, declining to scrutinize the regulations or assess their likely effectiveness. *1000 Friends*, at 17-26. However, the Board found, after a detailed statutory analysis, that the GMA requirement to conduct the .130(3) urban growth area review no later than December 1, 2005, applies to Kitsap County. *Id*. at 26-37.

Bremerton II and *1000 Friends* were appealed, consolidated, heard and decided in Thurston County Superior Court [Cause No. 04-2-02138-1, 05-2-01564-8, 05-2-01678-

4].[4] The Superior Court's Decision Following Trial upheld the Board's determination that the GMA required Kitsap County to complete a ten-year UGA review by December 1, 2004. The Court also affirmed the Board's decision that Kitsap was required to adopt "reasonable measures" pursuant to RCW 36.70A.215(4). However, the Court reversed the Board's approval of the reasonable measures adopted by Kitsap County in Resolution 158-2004, and remanded that portion of *1000 Friends* to the Board.

The Superior Court had declined to stay the Board's *Bremerton II* and *1000 Friends* decisions, and Kitsap has been working on the 10-year UGA update, with an extended [18 months] compliance date of December 31, 2006. *1000 Friends*, Order Amending Compliance Schedule (Oct. 14, 2005).

V. LEGAL ISSUES AND DISCUSSION

A. Legal Issue No. 1

The PHO states Legal Issue No. 1 as follows:

> *Legal Issue 1: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and fail to comply with RCW 36.70A.130(3) and this Board's Final Decision and Order in 1000 Friends v Kitsap County (04-3-0031c) by adjusting an isolated UGA without first completing the countywide ten year UGA update as required by the GMA and this Board's Order?*

Applicable Law

RCW 36.70A.130(3) provides the basis for Petitioners' challenge:

> **RCW 36.70A.130 Comprehensive plans -- Review -- Amendments.**
>
> (3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.
>
> (b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the

[4] The Court's Decision Following Trial (Dec. 21, 2005) [Supplemental Ex. 2] and Order (June 16, 2006) are attached as Appendix B. The Order remands the matter to the Board for compliance proceedings. The Board received the Order on July 14, 2006, as an attachment to a Motion to Stay in the Supreme Court. Due to the pendency of that motion, the Board has not yet scheduled remand proceedings in *1000 Friends.*

> county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

Petitioners also appeal to Goals (1) and (2) of the GMA – RCW 36.70A.020(1) and (2):

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.

Discussion and Analysis

Positions of the Parties

Petitioners contend that the County failed to conduct a mandatory ten-year UGA update prior to expanding the Kingston UGA. KCRP PHB at 2-3. More specifically, Petitioners argue that "producing a stand-alone, UGA-expanding sub-area plan (using an updated population allocation) while under order to conduct instead a county-wide UGA update, violates RCW 36/70A.130(3) as interpreted by the Board and the Court in *1000 Friends* and directly contradicts this Board's Compliance Order in that case." *Id.* Petitioners reference and rely on their extensive arguments in the prior case and on the Board's FDO and the Thurston Court's affirmance. *Id.* and KCRP Reply at 3.

The County responds by asserting that Petitioners have not sufficiently plead this issue and have therefore abandoned it. County Response at 8. Alternatively, the County responds by asserting that the expansion of the Kingston UGA was valid because RCW 36.70A.115 sets out the requirement that jurisdictions must periodically provide enough land within a UGA to accommodate projected growth—but it does not require that every change in the UGA must also be accompanied by a complete review of the population distribution process. *Id.* at 9-10. Stated another way, the County does not dispute that it is *required* to make appropriate changes to the UGA based on the ten-year UGA update, but its position is that it *may* make more frequent adjustments to the UGA in order to accommodate changes in the population forecast without a complete county-wide review.

Similarly, Intervenors respond by asserting that Petitioners have not sufficiently plead this issue and have therefore abandoned it. OPG Response at 16. Intervenors also argue that RCW 36.70A.130(3) only "requires a UGA update at least every ten years," but that it "does not otherwise preclude or even limit UGA amendments either before or after the ten-year review." *Id.* at 17. They support their position by pointing out that under RCW 36.70A.130(1) the County is required to *continuously* review and update its comprehensive plan. *Id.* at 18. Further, they argue that none of these sections refers to the ten-year review as a prerequisite for adjustment to the UGA. *Id.* Intervenors interpret the Board's Order of Compliance in *1000 Friends* as "merely holding that the County

failed to act within the required ten years when it did not review its UGA designations and densities by December 1, 2004." *Id.* According to their reading, the Order "did not hold or even suggest" that completion of the ten-year review was a requirement for the County to amend its UGA. *Id.* at 19.

Board Discussion

RCW 36.70A.130(3) has two subsections. Subsection (a) requires counties to review their designated UGAs and permitted urban densities at least every ten years. Then subsection (b) requires revision to comprehensive plans to accommodate the urban growth projected for the next twenty years. The revisions may include changes to UGA designations and changes to permitted densities. Kitsap argues that it is immaterial that it has inverted the order of these subsections with respect to the Kingston Sub-Area Plan.

In Ordinance 327-2004, Kitsap County amended its Countywide Planning Policies to include a new OFM population target through 2025, allocating population to all ten UGAs in the County. The next step under the statute should be the ten-year UGA and density review, followed by comprehensive plan amendments. Here, Kitsap County has not yet completed the GMA process of ten-year UGA and density review [.130(a)] nor amended its comprehensive plan to accommodate all the 20-year growth projection [.130(b)]. Nonetheless, in the Kingston Sub-Area Plan the County used a portion of the 2025 growth allocation to justify the expanded sub-area UGA. As Petitioners point out, expanding a sub-area UGA in advance of the required countywide assessment undermines the GMA purpose of absorbing growth in existing urban areas.

There is no dispute as to the facts here. The County's record *does not contain* a county-wide assessment of urban growth areas and permitted densities that supports expanding the Kingston UGA. The requisite comprehensive plan amendments to accommodate the total new target *have not been adopted*.

The Board finds that Petitioners have **carried their burden of proving** Legal Issue No. 1, particularly in light of the reasoning of the Thurston Court which linked the twenty-year population targets provided by OFM to the ten-year UGA review required under GMA and found that the delay proposed by Kitsap County "would continue to limit the effectiveness of the statute." [Decision, at 3] The Board is persuaded that the County's action in adopting a Kingston Sub-Area Plan that again expanded the UGA, without first completing the countywide ten-year review of its UGAs and amending its comprehensive plan to accommodate the full 2025 population target was **clearly erroneous.** Adoption of Ordinance 352-2005 **does not comply** with RCW 36.70A.130(3).

Petitioners also assert that piecemeal UGA expansion prior to county-wide UGA review is contrary to the goals of the GMA, particularly Goals (1) – encourage development in urban areas - and (2) – reduce the inappropriate conversion of undeveloped land. The Board concurs. The GMA was enacted to ensure coordinated and comprehensive land use planning, with the county as the coordinating level of government. RCW 36.70A.010, .040(4). Expanding an isolated UGA to accommodate a portion of a new target

population, before determining where and how much population other urban areas in the county can reasonably absorb, is inconsistent with the goals of the Act. The Board is "left with the firm and definite conviction that a mistake has been made."

Conclusion

Kitsap County's adoption of Ordinance No. 352-2005, expanding the UGA in the Kingston Sub-Area Plan, was **clearly erroneous** and **did not comply** with the requirements of RCW 36.70A.130(3), and the adoption **was not guided by** Goal 1 – [encourage development in urban areas where infrastructure exists] - and Goal 2 – [prevent inappropriate conversion of undeveloped land] - RCW 36.70A.020(1) and (2). Therefore the Board will **remand** the Kingston Sub-Area Plan, directing Kitsap County to take legislative action to comply with the goals and requirements of the Act.

B. Legal Issue No. 2

The PHO states Legal Issue No. 2 as follows:

> *Legal Issue 2: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.020(4)*[5] *and fail to comply with RCW 36.70A.115 by amending the Comprehensive Plan without accommodating all allocated growth as required by the GMA?*

Applicable Law

RCW 36.70A.115 provides the basis for Petitioners' challenge:

> **RCW 36.70A.115 Comprehensive plans and development regulations must provide sufficient land capacity for development.**
>
> Counties and cities that are required or choose to plan under RCW 36.70A.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

[5] Petitioners' Prehearing Brief makes only a passing reference to Goal 4 – Housing – and presents no argument on this matter. KCRP PHB, at 3. The Board deems the issue **abandoned.**

Discussion and Analysis

Positions of the Parties

According to Petitioners, Kitsap's CPPs provide clear policy language to implement RCW 36.70A.115:

> **Element B: Policies for Urban Growth Areas (UGA):**
>
> **CPP B.1: Land Capacity Analysis Program:**
>
> Consistent with RCW 36.70A.115, the County and Cities shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their housing and employment growth (derived from population distribution), as adopted in the applicable County-wide Planning Policies and consistent with the 20-year population forecast from the WA Office of Financial Management.
>
> **CPP B.2: Process and criteria for establishing, expanding, and adjusting Urban Growth Areas in Kitsap County:**
>
> d. Sufficient area must be included in the Urban Growth Areas to accommodate the adopted 20-year population distribution as adopted by the Kitsap Regional Coordinating Council and consistent with WA Office of Financial Management projections.
>
> **CPP B.4: Distribution of 20 year population increments, as forecasted by the WA Office of Financial Management:**
>
> a. The Kitsap Regional Coordinating Council shall coordinate the process for distributing the forecasted population for the period 2005 – 2025 and every five years thereafter, consistent with the requirements of the Growth Management Act. Kitsap County shall adopt any revision to the population distribution as part of its *next* Comprehensive Plan amendment process and the Cities shall base their Comprehensive Plan amendments upon that distribution. *The distribution process should consider county-wide demographic analysis, the Land Capacity Analysis, and the OFM projections and it shall promote a county-wide development pattern* targeting over three quarters (76%) of new population growth to the designated Urban Growth Areas. The County and the Cities recognize that the success of this development pattern requires not only the rigorous support of Kitsap County in the rural areas, but also Cities' comprehensive plans being designed to attract substantial new population growth.

Countywide Planning Policies, *Element B: Urban Growth Areas* at pages 9-14 (Emphasis supplied by Petitioners).

Petitioners point out that Kitsap amended its Countywide Planning Policies (**CPPs**) in November, 2004, to allocate population growth through 2025 for its four cities, ten unincorporated UGAs, and the rural area. KCRP PHB at 5. Petitioners note that Ordinance 352-2005, the first comprehensive plan amendment subsequent to adoption of the new population targets, only adjusted the Kingston sub-area, in isolation from the county-wide demographic analysis, land capacity analysis and county-wide development pattern expressly called out in the CPPs. *Id*. Petitioners then assert, pursuant to RCW 36.70A.115, that an amendment to the Comprehensive Plan must take into consideration *all* UGAs in the County before allocating and accommodating growth in any particular UGA. *Id.* Correspondingly, Petitioners take the position that the review and expansion of *only* the Kingston UGA should be invalid because the County failed to consider whether growth might have been better allocated and accommodated by the other nine unincorporated UGAs located in Kitsap County. *Id.* at 6.

The County responds that CPP B.4 applies to the *allocation* ("distribution") of population growth among the cities and the County, not to the County's Comprehensive Plan amendments that *accommodate* the County's share of that growth. County Response, at 12. The County agrees that RCW 36.70A.115 requires that the County must undertake a county-wide demographic analysis to forecast population needs. *Id*. The County also agrees that based on its demographic analysis it must provide sufficient capacity to accommodate that growth. *Id.* The County's position, however, is that it does not have to completely revisit its "population distribution process" each time that it seeks to enact regulations that will help accommodate that growth. *Id.* Stated another way, the County agrees that it must analyze county-wide population trends at least every five years—but it asserts that it can then rely on those five-year benchmarks as a basis for amending its comprehensive plan (i.e., expand the Kingston UGA) to accommodate growth without having to annually re-analyze its population demographics.

Intervenors argue that nothing in the "County-wide Planning Policies or in RCW 36.70A.115 indicates when or how the County and cities must accommodate the allocated growth, or even that they must do so at the same time." OPG Response at 22. Intervenors argue that the County can make UGA changes at any time to accommodate growth without having to completely re-analyze its population demographics. *Id.* at 21.

Board Discussion

The sequence set forth in RCW 36,70A.130(3) – first conduct a ten-year review of UGAs and permitted densities and then amend comprehensive plans to accommodate new twenty-year growth projections – is reinforced by RCW 36.70A.115, which requires counties to "ensure" that comprehensive plan amendments "taken collectively" accommodate their allocated growth consistent with the twenty-year OFM population forecasts and with the applicable countywide planning policies. In the Board's view, the Kitsap County Comprehensive Plan amendment adopting the Kingston Sub-Area Plan

[based on 2025 population targets], taken collectively with the remainder of the County's current plan [based on 2017 targets], (a) does not accommodate the County's allocated growth, (b) is not consistent with the OFM population forecast for the County, and (c) is inconsistent with CPP B.2.

The County argues that the Kingston Sub-Area Plan is simply a first step in the UGA adjustments necessitated by the updated 2025 population target. "Taken collectively," according to the County, doesn't mean "simultaneously;" the GMA doesn't require all sub-area UGAs to be mapped and adopted in the same action. However, here the County *has not yet done the prerequisite county-wide demographic and UGA analysis* that might support a subsequent set of sub-area plans. This Board in *Bremerton II* accepted Kitsap sub-area plans adjusting and expanding UGA boundaries for Kingston, SKIA, and ULID #6, based on the 1998 Comprehensive Plan and 2012-17 population targets. However, the new targets – to 2025 – require a comprehensive updated analysis in compliance with RCW 36.70A.130(3)[6] and the Countywide Planning Policies.

The Board finds that Petitioners have **carried their burden of proving** Legal Issue No. 2. The Board is persuaded that the County's action in adopting a 2005 Kingston Sub-Area Plan that expanded the UGA to accommodate a portion of the 2025 population target, prior to the county-wide analysis and collective consideration required by RCW 36.70A.115 and the Countywide Planning Policies, was **clearly erroneous.** The Board is left with the firm and definite conviction that a mistake has been made. Adoption of Ordinance 352-2005 **does not comply** with RCW 36.70A.115. For the reasons set forth under Legal Issue No. 1, the action is also inconsistent with GMA Goals (1) and (2).

Conclusion

Kitsap County's adoption of Ordinance No. 352-2005, expanding the UGA in the Kingston Sub-Area Plan, was **clearly erroneous** and **did not comply** with the requirements of RCW 36.70A.115, and the adoption **was not guided by** Goal 1 – [encourage development in urban areas where infrastructure exists] - and Goal 2 – [prevent inappropriate conversion of undeveloped land] -RCW 36.70A.020(1) and (2). Therefore the Board will **remand** the Kingston Sub-Area Plan, directing Kitsap County to take legislative action to comply with the goals and requirements of the Act.

C. Legal Issue No. 3

The PHO states Legal Issue No. 3 as follows:

> *Legal Issue 3: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1) and RCW 36.70A.020(2) and fail to comply with RCW 36.70A.215 and this Board's Final Decision and Order (as modified by the Thurston County Superior Court) in 1000 Friends v Kitsap County (04-3-0031c) by adjusting*

[6] Whether, after that analysis and resulting comprehensive plan amendments, the Board would approve additional piecemeal UGA expansions on a sub-area basis, is not before the Board in this proceeding.

the UGA rather than implementing measures other than adjusting UGAs reasonably likely to increase consistency between actual and planned growth as required by the GMA?

Applicable Law

RCW 36.70A.215 provides the basis for Petitioners' challenge:

> **RCW 36.70A.215 Review and evaluation program.**
>
> (1) Subject to the limitations in subsection (7) of this section, a county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program. This program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130, and 36.70A.210. In developing and implementing the review and evaluation program required by this section, the county and its cities shall consider information from other appropriate jurisdictions and sources. The purpose of the review and evaluation program shall be to:
>
> (a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
>
> (b) *Identify reasonable measures, other than adjusting urban growth areas,* that will be taken to comply with the requirements of this chapter.
> ….
>
> (4) If the evaluation required by subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and the requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, the county and its cities *shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period.* If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-wide planning policies to increase consistency. The county and its cities shall annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate.

Emphasis supplied.

Discussion and Analysis

Positions of the Parties

Petitioners contend that the County failed to implement reasonable measures to accommodate expected growth within the current Kingston UGA before they resorted to an expansion of the UGA boundary. KCRP PHB at 6-8. More specifically, Petitioners argue that the County's ordinance to expand the Kingston UGA should be deemed invalid because the County failed to implement reasonable measures pursuant to this Board's interpretation of RCW 36.70A.215(4) in *Bremerton II*. *Id.* Petitioners rely on the *1000 Friends* decision in Thurston County Superior Court, where the Court ruled that the County's measures were in fact not reasonably likely to produce the necessary results. *Id.* at 7.

The County responds that Petitioners have not sufficiently argued this issue and have therefore abandoned it. County Response at 13. Alternatively, the County states that it implemented reasonable measures when it considered 47 different reasonable measures and then applied 37 of those measures in the Kingston Sub-Area Plan in "some form or another." *Id.* Furthermore, the County asserts that the GMA neither defines what constitutes reasonable measures nor specifies which reasonable measures the County must employ and that, therefore, such determinations are within its discretion and the measures chosen and implemented by the County were reasonable. *Id*. at 14.

Similarly, Intervenors take the position that, regardless of whether or to what extent the Thurston County Superior Court reversed or has questioned whether the County's measures were reasonable, the Petitioners have failed to carry their burden of proof in the present case. OPG Response, at 23-24. Intervenors point out that although the Petitioners limited their analysis to those measures identified and adopted in Resolution 158-2004, the County in fact considered and adopted many more measures in the Kingston Sub-Area Plan. *Id.* For example, the County required that the vested low-density Arborwood plat be withdrawn, thus allowing for the inclusion of Arborwood in the UGA, increasing densities from approximately one dwelling unit per acre to five dwelling units per acre – an urban density consistent with the goals of the GMA. *Id.* at 25.

Board Discussion

The Board concurs with Petitioners that the County must identify and adopt reasonable measures as required in RCW 36.70A.215 "other than adjusting urban growth areas."

The Thurston County Superior Court affirmed this Board's ruling in *Bremerton II* that discrepancies between on-the-ground development patterns and the County's plans required the County to identify and implement "reasonable measures" to reduce the inconsistencies. *See*, Decision after Trial, Appendix B, *infra*. The Court then reversed this Board's ruling in *1000 Friends* with respect to the 18 "reasonable measures" listed by Kitsap County in Resolution 158-2004, which had been challenged by Petitioner Harless

in that case. The Court found that Resolution 158-2004 was a summary of actions previously taken by the County, was not adopted in response to the evaluation process required in RCW 36.70A.215 and, therefore, was not reasonably likely to remedy inconsistent development patterns. As stated by Thurston County Superior Court in *1000 Friends*:

> The statute anticipates an evaluation based upon data collected and, where consistency is needed, remedial measures to be taken to improve consistency. Presenting a litany of prior measures taken [in Resolution 158-2004] when those measures have obviously not achieved the desired result is contrary to the intent of the statute, which is to adopt measures over time which will achieve certain goals. Harless presented to the Board evidence that these measures were ineffective and the County was unable to rebut that evidence.

Decision after Trial, at 5.

The Board concurs with Petitioners that the County may not rely on the previously-adopted measures here, nor is Petitioner required to reargue his critique – measure by measure – of the County's actions as Intervenors propose. *See Clallam County v. Western Washington Growth Management Hearings Board*, 130 Wash. App. 127, 131-32, 121 P.3d 764 (Div. II, Oct. 25, 2005) (issue preclusion bars relitigation of an issue in a subsequent proceeding involving the same parties, even if a different cause of action is asserted).

However, Kitsap County states that there were 46 reasonable measures appended to the Kingston Sub-Area Plan as Appendix C [Core Document] and that all but 11 of these 46 measures were incorporated in the Kingston Sub-Area Plan. County Response, at 13. The County points out that these measures were fully discussed by the Kingston Sub-Area Plan Working Group. Index 27653, 27639, 27722, 28469, 28392. In short, the County claims that a new suite of measures were implemented in compliance with RCW 36.70A.215.

To the contrary, Ordinance 352-2005 is quite explicit about the reasonable measures relied on by the County in adopting the Kingston UGA expansion:

> **Section 2. General Procedural Findings.**
>
> **3.d**. On May 18, June 15, and July 20, 2005 the Steering Committee met to discuss Reasonable Measures identified in Resolution 158-2004 and the Kitsap Regional Coordinating Council (KRCC) Desktop Reference Guide to Reasonable Measures. The Steering Committee reviewed *measures already existing in the Kingston Sub-Area Plan goals and policies, as outlined in Resolution 158-2004.* The Steering Committee determined that the Kingston Sub-Area Plan, originally adopted in 2003, contained reasonable measures that would increase urban densities within the urban growth area.

Section 4. Substantive Findings related to the Kingston Sub-Area Plan

> **9**. The Board finds that measures likely to increase consistency between the comprehensive plan and development regulations, *outlined in Resolution 158-2004* and the KRCC Desktop Reference Guide to Reasonable Measures have been applied and implemented in the Kingston Sub-Area Plan.

Ordinance 325-2005, at xi, xvi (emphasis supplied).

From the Board's comparison of the measures in Appendix C of the Updated Kingston Sub-Area Plan with the measures in Resolution 158-2004, at least 10 of the Kingston measures appear to reiterate items in Resolution 158-2004[7] and another 7 are linked to the Kingston Urban Center Design Standards adopted in December 2000.[8] As Petitioner stated at the HOM: "you cannot identify anywhere in the record, at least I couldn't, any measure adopted or implemented in the Kingston subarea plan that wasn't already in place which, of course, leads back to that Resolution 158." HOM, at 26.[9]

Intervenors ask the Board to consider the Kingston Sub-Area Plan itself, which substitutes an Arborwood development built to urban densities in the expanded UGA for the previously-vested low-density Arborwood plat. In its June 30, 2005, rezoning request to the County, under "Reasonable Measures," the Arborwood project manager cited to discussion at sub-area committee meetings of "different forms of cluster concepts" which use "the principal of condensing land uses." *See*, Index 28404, at 5. The Board notes that these cluster concepts were discussed with reference to the plans for Arborwood, *not in lieu of UGA expansion* or to promote infill in the existing UGA.

The Board's analysis finds that at least 7 of the 46 reasonable measures considered in the Kingston Plan were apparently adopted as components of and contingent upon the *expansion* of the UGA to incorporate the Arborwood development.[10] However, the GMA specifically requires that a county "identify reasonable measures, *other than adjusting urban growth areas*, that will be taken to comply with the requirements of this chapter." In this regard, the Board concurs with Petitioners that requiring urban density and other measures in the expanded portion of the UGA is not a measure reasonably likely to improve the infill of presently-underutilized urban lands or reduce pressure for permitting sprawl development in rural areas in the future.

RCW 36.70A.215 requires remedial measures [other that adjusting urban growth areas] to be identified and implemented when inconsistencies are found between comprehensive

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[7] Kingston Measures 1, 2, 3, 4, 5, 153, 15, 24, 27, and 40 appear to reiterate Resolution 158-2004 measures 1, 2, 3, 4, 5, 6, 9, 21, 40, and 41.

[8] Measures 2, 16, 23, 24, 31, 33, and 34.

[9] Kitsap's Ordinance 325-2005, relying on reasonable measures listed in Resolution 158-2004, was enacted on December 21, 2005. The Court's reversal of the Board's ruling on those reasonable measures was issued December 22, 2005. There is no bad faith in the County's reliance on these measures.

[10] Measures 2, 4, 5, 8, 15, 36, 43, and 45.

plans and actual development. The measures must be reasonably likely to achieve the desired results over time. Here the County adopted what the Thurston Court characterized as "a litany of prior measures taken," together with a set of measures directly tied to UGA expansion. The Board is left with a firm and definite conviction that a mistake has been made.

Conclusion

The Board finds and concludes that Kitsap County's adoption of Ordinance No. 352-2005, expanding the UGA in the Kingston Sub-Area Plan prior to implementing measures likely to increase consistency with County growth policies, was **clearly erroneous** and **did not comply** with the requirements of RCW 36.70A.215(1)(b) and (4), and the adoption **was not guided by** Goal 1 – [encourage development in urban areas where urban infrastructure exists] – and Goal 2 – [prevent sprawl] – RCW 36.70A.020(1) and (2). Therefore the Board **remands** the Kingston Sub-Area Plan, directing Kitsap County to take legislative action to comply with the goals and requirements of the Act as set forth in this Order.

D. Legal Issue No. 4

The PHO states Legal Issue No. 4 as follows:

> *Legal Issue 4: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.020(12) and fail to comply with RCW 36.70A.070 and RCW 36.70A.110 by utilizing a non-compliant Urban Land Capacity Analysis as a basis for expanding the UGA resulting in an excessively oversized UGA and failure to provide urban services adequate to support planned growth as required by the GMA?*

Applicable Law

RCW 36.70A.070 and .110, together with GMA Planning Goals (1) and (12), provide the basis for Petitioners' challenge:

> **RCW 36.70A.070 Comprehensive Plans – Mandatory elements**
>
> Each comprehensive plan shall include a plan, scheme, or design for each of the following: …
>
> (3) A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such

purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

RCW 36.70A.110 Comprehensive plans -- Urban growth areas.

(1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. …

(2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.

Each urban growth area shall permit urban densities and shall include greenbelt and open space areas…. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth. …

(3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

RCW 36.70A.020 provides the goals to guide GMA plans:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

Discussion and Analysis

Positions of the Parties

With Legal Issue 4, the Petitioners argue that the Land Capacity Analysis (**LCA**) and Capital Facilities Element (**CFE**) used by the County were erroneous and therefore led to an unwarranted expansion of the UGA. KCRP PHB at 8-9. Petitioners assert that the LCA erroneously excludes from its inventory of "vacant land" significant categories of undeveloped land which might in fact be developed within the 20-year planning horizon and therefore could accommodate growth without expanding the UGA. *Id.* at 11-14. Petitioners raise specific arguments concerning the exclusion of "current use" tax parcels, shoreline parcels, ½ acre parcels, sewer constrained lands, and the calculation of reductions for critical areas and buffers. *Id.* With respect to the CFE in particular, Petitioners assert that the expansion of the Kingston UGA was not accompanied by sufficient infrastructure such that the services (i.e., fire, emergency, law enforcement, schools, etc.) would fall below the required level of service. *Id*. at 15-32.

Petitioners make a three-part argument. Adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-area Plan Update" and expanding the Kingston Urban Growth Area:

1. Fails to be guided by GMA planning goals:
   - RCW 36.70A.020(1) – urban growth
   - RCW 36.70A.020(2) – reduce sprawl
   - RCW 36.70A.020(12) – ensure public facilities

2. Fails to comply with statutes because expansion of the UGA is based on a non-compliant Land Capacity Analysis, resulting in an excessively oversized UGA, and on a non-compliant Capital Facilities Plan
   - RCW 36.70A.070 - mandatory elements
   - RCW 36.70A.110 – UGAs

3. Fails to provide urban services adequate to support planned growth as required by the GMA

In particular, Petitioners are concerned about the absence of infrastructure plans for the existing UGA. According to Petitioners, "The issue is discounting the existing UGA in order to make room for expansion by abandoning the obligation to ensure capital facilities, mostly sewers…. The expansion becomes possible by changing the land capacity formula and abandoning the requirements to ensure sewers." HOM Transcript, at 81.

The County counters by arguing that the LCA and CFE were not erroneous. The County asserts that it applied a very thorough and competent methodology in determining whether the LCA and CFE justified an expansion of the UGA. County Response at 14-36. Further, the County contends that its methodology was actually more accurate because it took into account local conditions, excluding land which was unlikely to be

developed or redeveloped and, therefore, also unlikely to accommodate new growth. *Id.* at 15.

Board Discussion

A Land Capacity Analysis determines if there is adequate land available to accommodate future growth and development within a county or city's UGAs for the 20-year planning period. Kitsap County's 2006 Updated LCA (Appendix B) for the Kingston Sub-Area indicates that after applying reasonable measures, the existing Kingston UGA has 138 net developable acres for development/re-development comprised of 101.17 'vacant' net acres and 36.89 'underutilized' net acres, allowing for 874 persons, or a deficit of 2,261 persons from the allocated population. Therefore, the County concludes that the Kingston UGA needs to be expanded in order to accommodate the population. The crux of the Petitioners' claim is that Kitsap County has erroneously excluded certain lands from the LCA, resulting in an artificial need to expand the UGA in order to accommodate allocated growth and, further, that the County fails to ensure adequate urban services to the newly sized UGA.

LCA Methodology. Petitioners assert that with the adoption of Ordinance 352-2005 Kitsap County has expanded the Kingston UGA based on a "fatally flawed Land Capacity Analysis and without the capital facilities necessary to accommodate the allocated growth." KCRP PHB at 2. Petitioners argue that the County's new LCA methodology creates an excessively oversized UGA which, paired with a Capital Facilities Element (CFE) that doesn't provide adequate infrastructure, results in sprawl. *Id.* at 8-9. Petitioners assert that the LCA methodology systematically underestimates the development capacity of the existing urban land supply. *Id.* According to the Petitioners, the new methodology institutes a new, more restrictive definition of 'vacant lands,' changes several 'reduction factors,' and establishes a new reduction – 'sewer constrained lands' - all resulting in an excessively oversized UGA. *Id.* 10-11.

The County's LCA methodology first identified all residential partials considered vacant and/or underutilized in the UGA.[11] The County then subtracted any 'underutilized' acreage that could not accommodate, at the minimum, one additional dwelling unit over the next 20 years and also any land that is unlikely to redevelop due to the value, size of parcel, or layout of existing development. From the remaining acreage, land that is encumbered by critical areas and associated buffers which effectively renders these lands undevelopable is subtracted. The County then subtracts any land that would have infrastructure constraints, defined as parcels where water[12] or sewer is not likely to be available within the 20-year planning horizon. From this figure, further subtractions were made for future roads, public facilities (schools, parks, stormwater facilities, etc), and land unavailable for development due to owner intent, easements, or covenants.

[11] All vacant and underutilized lands were determined using the Assessor's tax codes.

[12] Water infrastructure has been determined to be sufficient but purveyors may not have the ability to provide water which would accommodate higher urban densities within a UGA and fire flow.

'Vacant lands' are identified by utilizing the Kitsap County Tax Assessor's codes as a basis for determining the amount of gross vacant land. Excluded from the vacant land acreage are 'tax exempt' parcels, 'current use' tax parcels, and all other parcels otherwise classified as developed in some manner. Petitioners dispute the programmatic exclusion of "current use" parcels because, despite their tax status, they are within the UGA and not zoned for agriculture. KCRP PHB at 11-12. The County states that parcels enrolled in the "current use"[13] tax relief program, even when they are located within the UGA and designated as Urban Residential, are not likely to develop or redevelop during the planning period because participation in the tax program requires adherence to strict criteria and financial penalties are imposed if the property is removed prior to the stated time period, generally 10 years. County Response at 16-17. Petitioners counter that, under the County's own criteria, the County should have excluded the Arborwood property from the LCA, as the property has a current use classification – Tax Code 88000 – Forestland. KCRP PHB at 12.

Petitioners also critique a number of other LCA provisions - all small shorelines parcels are excluded; the minimum underutilized parcel size is increased from 2.5 to 3.0 times current zoning; the non-development land factor was adjusted; critical areas were reduced by actual gross acreage; and the percentage reduction figures for roads and unavailable lands were modified. The Board notes that several of these factors might be folded into a "market factor" discount by other jurisdictions, where market factors can be as high as 25%.[14] Here Kitsap County uses a 5% market factor for vacant land and 15% for underutilized land while attempting more precise quantification of factors that might keep parcels off the redevelopment market in the 20-year planning horizon. County Response at 16. In its 1998 plan Kitsap County used a 15% market factor for vacant land and 30% for underutilized land. HOM, at 40-41. As the County points out, reducing the market-factor discount is possible because its land capacity analysis "is much more accurate than the methodology previously applied, and it is tailored to local circumstances." County Response at 18.

The Board concurs with the County – with the exception of the "sewer-constrained" lands discussed below - that the challenged exclusions from the LCA "vacant lands" inventory are within the discretion of Kitsap County, given that they are balanced by the substantially-reduced "market factor" discount applied by the County.

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[13] "Current Use" refers to the property tax relief for special use properties provided in RCW 84.33 and RCW 84.34. Properties are classified based on certain requirements and this classification allows the land's taxable value to be based on use not market value. Current use classifications include Open Space, Agricultural, Timber, and Forestland.

[14] In *Seattle King County Ass'n of Realtors v. King County*, CPSGMHB Case No. 04-3-0028, Final Decision and Order, May 31, 2005), at 19-20, the Board had these comments on the use of a market factor in conducting King County's Buildable Lands Review: "The market factor is a subjective judgment about how much of the total land in the jurisdiction may be held off the market for various reasons and therefore not be "available" for development. The statute does not specify any particular market factor to be used …. The BLR includes a range of market factors established and employed by different cities and for different zones…. Using a market factor that was less than that used on previous occasions for different purposes does not run afoul of any of the provisions of RCW 36.70A.215."

LCA Methodology – "Sewer Constrained" Lands. Petitioners argue that the reduction factor for "sewer constrained lands" is the LCA error with the greatest impact. KCRP PHB at 13. Petitioners point out that there are no provisions in the Kingston Sub-Area Plan or any development regulations that restrict development on the sewer constrained lands; in fact, the County permits development on urban lands using on-site septic systems, resulting in urban land being used less efficiently and developed at less than urban densities. *Id.* at 14-15. The County states that, given the high cost of sewer line extensions, the "sewer constraint analysis took into account a *parcel's distance from the sewer*, the *size of the parcel*, and the *zoning density*" in order to assess development feasibility. County Response at 24.

The County asserts that the GMA does not require that each and every parcel in a UGA be provided all public services, nor does the "[GMA] state that each an every parcel within a UGA must be provided a full level of service"[15] but rather all the GMA requires is "*adequate* urban services." County Response at 28. (Emphasis in original). In addition, the County points out that the "sewer-constrained" reduction is only applied to analysis of the capacity of the pre-existing UGA and not to property targeted for expansion of the UGA. *Id.* at 23.

Amici support the County's proposition, stating that "RCW 36.70A.020(12) establishes a planning 'goal' of having sufficient public facilities adequate to serve … [a goal that] is to be balanced against other competing goals … [there is] no requirement under GMA to *provide* capital facilities, but if there *is* urban growth it should only occur with adequate facilities to support it." *Amici* Brief at 14. *Amici* argue that the inclusion of this land would artificially inflate the land supply.

In the Board's view, providing urban infrastructure to the UGA within the twenty-year planning horizon is a required component of comprehensive plans – hence, the County's exclusion factor for "sewer constrained" lands is not a discretionary matter under the GMA. The GMA creates an affirmative duty to accommodate the growth allocated by the State. Under the explicit provisions of GMA, counties are required to provide land suitable for development and capable of accommodating the projected growth. *RCW 36.70A.115.* UGAs must be designated by counties, in consultation with municipalities, to accommodate 20 years of growth, based on forecasts provided by the Washington Office of Financial Management (OFM). *RCW 36.70A.110.* The key purpose of the UGA is to encourage and support urban development within these areas with adequate provisions of urban services and facilities *at the time* the development is available for occupancy. *RCW 36.70A.020(1), .020(12).* Urban growth requires urban services, including sanitary sewer systems. *RCW 36.70A.030(18), .030(19).* These are axioms clearly set forth in the GMA and in interpreting these provisions of the Act in numerous prior cases the Board has made consistent findings, conclusions, and rulings regarding the provision of urban services within urban growth areas over the twenty-year planning

[15] The County equates a full level of service as "a 100% service provision of all services to each and every parcel." County Response at 28.

period.[16] *See, most recently*, *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006) (ruling that water and sewer plans incorporated as elements of City Comprehensive Plan must address 20-year UGA population allocation); *Futurewise VII v. City of Issaquah*, CPSGMHB Case No. 05-3-0006, Final Decision and Order (July 20, 2005), at 28-29 (finding non-compliance with respect to un-sewered 150-unit subdivision).

Although the Board agrees that the County is not required to mandate that each and every parcel within a UGA secure urban services immediately,[17] the GMA does require that the County's twenty-year comprehensive plan must indicate how adequate public facilities will be provided to serve allocated urban-area population. The County is required to demonstrate that public services, including sewer, will be available for the allocated population within the twenty-year planning period. The County has many choices as to how or when within the twenty-year period it will provide those services and accommodate that growth. By excluding "sewer constrained" lands in the existing UGA (a total of 29.43 acres vacant or underutilized acres in the Kingston Sub-Area) from the LCA calculation based on assumptions grounded in the parcel's distance from the closest sewer main, parcel size, and the applicable zoning, the County fails to comply with the GMA requirement that all development within the UGA must be provided with urban facilities within the planning period.

The Board notes that in the last meeting of the Kingston Sub-Area Plan Working Group, on August 3, 2005, the community discussion closed in on the necessity for sewer line construction to allow for planned infill in the existing UGA. Index 28392, at 2-5. The participants clearly identified the lack of sewer connections as a main contributor to the leap-frog development patterns characterizing the Kingston UGA. *Id*. County staff advised the citizens that "the county doesn't have the funds to support all the infrastructure needs," which might necessitate "some adjustment to the [UGA] boundary." *Id*. at 6.

Kitsap County's exclusion of developable land, whether within the pre-existing UGA or the newly expanded UGA, because it is "sewer constrained," fails to comply with the GMA because it will not provide, within the 20-year planning period, urban services for all of the allocated population.[18]

---

[16] See generally, *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, Final Decision and Order, (June 3, 1994); *Bremerton, et al., v. Kitsap County / Alpine Evergreen, et al., v. Kitsap County*, CPSGMHB Case No. 95-3-0039c Coordinated with Case No. 98-3-0032c , Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*, (Feb. 8, 1999); *Corrine R. Hensley v. City of Woodinville*, CPSGMHB Case No. 96-3-0031, Final Decision and Order, (Feb. 25, 1997); *Citizens for Responsible Growth of Greater Lake Stevens, Ruth Brandal and Jody McVittie v. Snohomish County [Crescent Capital X and Master Builders Association of King and Snohomish County-Camano Association of Realtors – Intervenors]*, CPSGMHB Case No. 03-3-0013, Final Decision and Order, (Dec. 8, 2003).

[17] Such mandates are common in cities, which may, for example, require every home and business to subscribe to garbage and recycling pickup, use the city's potable water supply and link to the sewer system.

[18] The Governor's initiative to clean up Puget Sound and the Hood Canal, of which the Board takes notice pursuant to WAC 242-02-670(2), underscores the imperative for Puget Sound communities to improve wastewater and stormwater infrastructure and, it is hoped, will produce financial support for such efforts.

Capital Facilities Element

Petitioners challenge the County's Capital Facilities as being based on the 1998 Comprehensive Plan, which targeted a much lower population. KCRP PHB, at 27. Petitioners state:

> In order to be consistent with the Land Use Element and Final Land Use Map, Ordinance 352-2005 must update the 1999 (1998-2012) CFE for the 2025 planning horizon and the 6-year CIP through 2012. No such update is included in the text of the Kingston Sub-area Plan either directly or by reference. Chapter 7 of the Sub-area Plan, entitled "Capital Facilities", … does not begin to provide the inventory, needs analysis, determination of adequacy, planning and funding plan required by RCW 36.70A.070(3). Nor does it include any mechanism for reassessment of the land use element in the event of funding shortfalls.
>
> Kitsap County has been down this road before. A decade ago, this Board invalidated the County's comprehensive plan for lack of a complete CFE.

Id. at 27.

The County counters that the material missing from the Capital Facilities chapter in the Kingston Sub-Area Plan is detailed in the 2003 SEIS, which was "an integrated GMA/SEPA document." County Response at 28, *citing* Index 24629 at 5-24.[19] "Read together, those plans give all the information required by statute." *Id.* at 28.

Again, the Board notes the apparent lack of a twenty-year plan for extension of wastewater collection throughout the existing UGA. The extent to which the existing UGA lacks sewer connections is depicted in Figure 7.1 of the Capital Facilities chapter. Kingston Sub-Area Plan, at Ch. 7-10. The Board concurs with Petitioners that UGA expansion, in lieu of providing infrastructure within the existing UGA over a twenty-year time frame to accommodate projected population growth, does not meet the GMA requirements for the capital facilities element of the Kitsap County comprehensive plan.

GMA Goals (1), (2), and (12)

Petitioners argue that adoption of Ordinance 352-2005, which expanded the Kingston UGA, should be deemed invalid because it substantially interfered with the goals of the GMA. KCRP PHB at 33. More specifically, Petitioners contend that the expansion of the UGA in such a piecemeal fashion fails to reduce urban sprawl [goal 2] and fails to ensure that there will be adequate public facilities throughout the Kingston UGA [goal 12], thus also failing to encourage urban development where public facilities are available [goal 1]. *Id.* at 34.

[19] Index 24629, provided as an exhibit to the Board, either does not contain this material or contains only cursory descriptions and cross-references.

The County responds by reasserting that its LCA demonstrates that expansion of the Kingston UGA was necessary to accommodate new growth. County Response at 36. The County also responds that its CFE demonstrates that adequate public facilities will be available, particularly in light of the commitment of the Arborwood developer to bring in sewer lines and make other infrastructure and service contributions in the expanded Kingston UGA. *Id.*

The Board concurs with Petitioners that the Kingston Sub-Area Plan adopted by Ordinance 352-2005 is a recipe for the kind of leap-frog development that the Legislature hoped to forestall when it enacted the GMA. While deferring the capital facilities needed to support buildout of the existing UGA at urban densities, Kitsap County has expanded the UGA to incorporate a large subdivision with an eager proponent. Undoubtedly the Arborwood proposal has many commendable features for an expanded urban area, but without infill in the *existing* UGA, sprawl is perpetuated, contrary to Goal (2), and the provision of urban services becomes inefficient and more costly, contrary to Goals (1) and (12).

Both Goal (1) and (12) link compact urban development and the concurrent provision of urban services necessary to support that development. Petitioners argue that "the absence of sewer collection/transmission facilities over more than two-thirds of the [existing] UGA will doom that area to sprawl." KCRP PHB, at 34. The Board agrees that the GMA imposes a duty on counties and cities to provide urban services, notably sanitary sewers, to lands included in the UGA within the 20-year planning period. Failure to do so defeats Goals (1) and (12). See citations above, at fn.16. See also, *McVittie IV v. Snohomish County*, CPSGMHB Case No. 00-3-0006c, Final Decision and Order (Sept. 11, 2000), at 14-15; *McVittie v.Snohomish County*, CPSGMHB Case No. 99-3-0016c, Final Decision and Order (Feb. 9, 2000), at 29; *Loon Lake Property Owners Association, et al., v. Stevens County*, EWGMHB Case No. 01-1-0002c, Amended Final Decision and Order (Oct. 26, 2001); *Miotke v. Spokane County*, EWGMHB Case No. 05-1-0007, Final Decision and Order (Feb. 14, 2006), at 46.

The Board finds and concludes that Kitsap County's adoption of Ordinance No. 352-2005 was not guided by and is inconsistent with GMA Goals (1) and (12).

Conclusion

The Board finds that Petitioners have **carried their burden of proving** the portion of Legal Issue No. 4 concerning the provision of urban services to the existing UGA. The Board is persuaded that the County's action in adopting a Kingston Sub-Area Plan that expanded the UGA, based on a LCA *discounting un-serviced areas in the existing UGA* and a CFE *lacking plans to provide services to the existing UGA within the 20-year planning period*, was **clearly erroneous.** The Board is left with the firm and definite conviction that a mistake has been made.

The Board finds and concludes that Kitsap County's adoption of Ordinance No. 352-2005, expanding the UGA in the Kingston Sub-Area Plan, was **clearly erroneous** and

did not comply with the requirements of RCW 36.70A.070 and .110, and the adoption **was not guided by** Goal 1 – [encourage development in urban areas where infrastructure exists] - and Goal 12 – [ensure availability of adequate public facilities and services] - RCW 36.70A.020(1) and (12). Therefore the Board will **remand** the Kingston Sub-Area Plan, directing Kitsap County to take legislative action to comply with the goals and requirements of the Act.

V. INVALIDITY

The Board has previously held that a request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Petitioners here have requested the Board to find Ordinance 352-2005 – Kingston Sub-Area Plan - invalid. The PHO states Legal Issue No. 5 as follows:

> *Legal Issue 5: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area substantially interfere with the goals of the GMA such that this action should be held invalid by this Hearings Board?*

Applicable Law

The GMA's Invalidity Provision**,** RCW 36.70A.302, provides:

(1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
   (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
   (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
   (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Discussion and Analysis

In the discussion of Legal Issues 1, 2, 3 and 4, the Board found and concluded that Kitsap County's adoption of Ordinance No. 352-2005 was **clearly erroneous** and **non-compliant** with the requirements of RCW 36.70A.115, .130(3), .215, .070, and .110. The Board further found and concluded that the County's action **was not guided by the goals** of the Act, particularly goals 1, 2, and 12.[20] The Board is **remanding** the Ordinance with direction to the City to take legislative action to comply with the goals and requirements of the GMA as set forth in this Order.

Petitioners argue that adoption of Ordinance 352-2005, which expanded the Kingston UGA, should be deemed invalid because it substantially interfered with the goals of the GMA. KCRP PHB at 33. More specifically, Petitioners contend that the flawed UGA expansion fails to reduce urban sprawl [goal 2] and fails to ensure that there will be adequate public facilities throughout the Kingston UGA [goal 12], thus also failing to encourage urban development where public facilities are available [goal 1]. *Id.* at 34.

The County responds by reasserting that its LCA demonstrates that expansion of the Kingston Sub-Area UGA was necessary to accommodate new growth. County Response at 36. The County also responds that its CFE demonstrates that adequate public facilities will be available, particularly in light of the commitment of the Arborwood developer to bring in sewer lines and make other infrastructure and service contributions in the expanded Kingston UGA. *Id.*

A Board *may* enter an order of invalidity upon a determination that the continued validity of a non-compliant city or county enactment substantially interferes with fulfillment of the goals of the GMA. RCW 36.70A.302(1)(b).[21] As set forth in the findings and conclusions above, the expansion of the Kingston Sub-Area UGA interferes with the fulfillment of the goals of the GMA, in particular RCW 36.70A.020(1), (2), and (12), because the enactment thwarts the GMA mandate to accommodate urban growth where urban services can be provided, to reduce low-density sprawl, and to ensure provision of urban services in urban areas.

Nonetheless, the Board is cognizant that Kitsap County is in the process of completing its ten-year UGA review and revisions of its comprehensive plan which will account for all of the County's allocated growth through 2025. The work is subject to an extended

---

[20] Petitioner relies on the following goals:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. [Legal Issues 1, 2, 3, and 4]
>
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. [Legal Issues 1, 2, 3, and 4]
>
> (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. [Legal Issue 4]

[21] Invalidity is most often invoked to prevent the vesting of projects to city or county enactments that are not compliant with the GMA.

compliance schedule with legislative action to be taken no later than December 31, 2006. [CPSGMHB Case No. 04-3-0031c, Order Amending Compliance Schedule (Oct. 14, 2005)].[22] The County states that the Kingston Sub-Area Plan will be "revisited as the ten-year [review] is done countywide just in the off chance that anything needs to be adjusted … If we have to, then we'll … adjust the UGA boundary again." HOM Transcript at 66.

The need for this review having been acknowledged, the Board presumes the work will move forward, that the County will adopt and follow an appropriate public participation process, and that consistency with the Comprehensive Plan and CFP in their annual review cycles will be achieved. As the Board has stated:

> [T]he Board will never presume that future actions of government will be taken in bad faith. Instead, the Board will assume that prospective governmental actions will be taken in good faith in an effort to comply with the Act. This assumption will be made regardless of whether the jurisdiction has been repeatedly found in noncompliance in the past.

Pilchuk II v. Snohomish County, CPSGMHB Case No. 95-3-0047, Final Decision and Order (Dec. 6, 1995), at IV, 118; *Central Puget Sound Regional Transit Agency v. City of Tukwila*, CPSGMHB Case No. 99-3-0003, Final Decision and Order (Sept. 15, 1999), at III.C.9.

Accordingly, the Board does not enter an order of invalidity but remands Ordinance No. 352-2005 to Kitsap County to take legislative action consistent with this Order. The Board establishes a compliance schedule concurrent with the extended compliance schedule in CPSGMHB Case No. 04-3-0031c.

Conclusion

The Board makes a finding of **noncompliance** and issues an order of **remand**. The Board **does not enter an order of invalidity at this time**, but establishes a schedule for the County to take legislative action to comply with the Growth Management Act as set forth in this Order.

VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Petitioners failed to provide evidence or argument with respect to GMA Goal 4 – Housing; this portion of Legal Issue No. 2 is **abandoned.**
2. Kitsap County's adoption of Ordinance No. 352-2005, the Kingston Sub-Area Plan, was **clearly erroneous** and **does not comply** with the requirements of RCW

[22] Kitsap County's Third Progress Report in that matter was received by the Board on June 30, 2006.

36.70A.215, .130(3), .115, .070 and .110, and **is not guided** by GMA goals RCW 36.70A.020(1), (2), and (12).

3. Therefore the Board **remands** Ordinance No. 352-2005 to Kitsap County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
4. The Board sets the following schedule for the County's compliance:

   - The Board establishes **December 31, 2006,** as the deadline for Kitsap County to take appropriate legislative action.
   - By no later than **January 10, 2007**, Kitsap County shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the County shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
   - By no later than **January 22, 2007**,[23] the Petitioners may file with the Board an original and four copies of Response to the County's SATC.
   - By no later than **January 26, 2007**, the County may file with the Board a Reply to Petitioners' Response.
   - Each of the pleadings listed above shall be simultaneously served on each of the other parties to this proceeding, including Intervenors, and upon *Amici*, at their request.
   - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **February 2, 2007, at 11:00 a.m.,** or immediately following the Compliance Hearing in CPSGMHB Case No. 04-3-0031c. The hearing will be held at the Board's offices.[24] If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If Kitsap County takes the required legislative action prior to the December 31, 2006, deadline set forth in this Order, the County may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 26th day of July 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

[23] January 22, 2007, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in this FDO.

[24] The Board's office is relocating on October 10, 2006, to Suite 2348, Bank of America Fifth Avenue Plaza, 800 Fifth Avenue in Seattle.

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[25]

[25] Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Chronology of Procedures in CPSGMHB Case No. 06-3-0007

On February 17, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kitsap Citizens for Responsible Planning and Jerry Harless (**KCRP** or **Petitioners**). The matter was assigned Case No. 06-3-0007, and is hereafter referred to as *KCRP VI*. Board member Bruce Laing is the Presiding Officer for this matter. Petitioners challenge Kitsap County (**Respondent** or **Kitsap** or **County**) adoption of Ordinance No. 352-2005 (the **Ordinance**) which amended the Kingston Sub-Area Plan and corresponding development regulations. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On February 22, 2006 the Board received Kitsap County's Notice of Appearance and Notice of Unavailability of Attorney for Respondent.

On February 23, 2006, the Board issued its Notice of Hearing (**NOH**) setting a date for Prehearing Conference (PHC) and containing a tentative schedule for this case.

On February 27, 2006, the Board received a Request for Schedule Change from Petitioner KCRP proposing a revised schedule with dates to which the Petitioners and Respondent had agreed.

On March 1, 2006, the Board received Petitioner's Amended Petition for Review.

On March 7, 2006, the Board issued its Order Amending Case Schedule.

On March 9, 2006, the Board received OPG Properties LLC's Motion to Intervene.

On March 15, 2006, the Board received a Supplemental Declaration of Service from OPG Properties LLC for its Motion to Intervene.

On March 28, 2006, the Board received Respondent's Index of the Record.

On March 28, 2006, the Board conducted the PHC in the Fifth Floor Conference Room, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board member Bruce Laing, Presiding Officer in this matter, conducted the conference, with Board members Margaret Pageler and Board extern Amie Hirsch in attendance. Tom Donnelly represented Petitioner Kitsap Citizens for Responsible Growth. Petitioner Jerry Harless appeared *pro se.* Shelley Kneip, representing Respondent Kitsap County, was accompanied by Lisa Nickel. Charles Maduell represented OPG Properties, LLC, proposed Intervenors.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board encourages such efforts and can arrange for mediation or settlement assistance by members of the Eastern or Western Growth Management Hearings Boards. If the parties are pursuing settlement, with or without

Board assistance, they may so stipulate in a request for a settlement extension. The Board is empowered to grant settlement extensions for up to ninety days.

The Board then reviewed its procedures for the hearing, including the composition of the Index to the record below; filing of core documents, exhibit lists and supplemental exhibits; possible dispositive motions; the Legal Issues to be decided; and a Final Schedule. Respondent Kitsap County requested an early Hearing on the Merits to accommodate the schedule of the County's attorney. Accordingly, the schedule for motions practice was merged with the schedule for briefing on the merits.

On March 31, 2006, the Board issued its Prehearing Order and Order on Intervention.

On April 4, 2006, the Board received the requested core document: 2005 Final Kingston Sub-area Plan Update, dated December 21, 2005 (Attachment 1 to Ordinance No. 352-2005).

All briefs were timely filed. On May 12, 2006, the Board received Petitioners' Prehearing Brief with five exhibits [**KCRP PHB**] and Petitioners' Motion to Supplement with three exhibits.

On May 26, 2006, the Board received Respondent Kitsap County's Prehearing Brief [**County Response**] with 22 exhibits and the accompanying Declaration of Michael J. Michael and Declaration of Barry Loveless. The Board also received Kitsap County's Response to Motion to Supplement, agreeing to the inclusion of two items and objecting to the third.

On May 26, 2006, the Board received Intervenor OPG Properties LLC's Prehearing Brief [**OPG Response**] with 8 exhibits.

On May 26, 2006, the Board received "Motion of Home Builders Association of Kitsap County [**HBAKC**] and Kitsap County Association of Realtors [**KCAR**] for Leave to File an *Amicus Curiae* Brief" [***Amicus* Motion**], "*Amicus Curiae* Brief of Home Builders Association of Kitsap County and Kitsap County Association of Realtors" [***Amicus* Brief**], and "Declaration of Art Castle, Executive Vice President for the Home Builders Association of Kitsap County." *Amici* propose to address only Legal Issue No. 4.

On May 30, 2006, the Board received "Petitioners' Response to HBAKC/KCAR *Amicus Curiae* Motion and Motion to Strike." Petitioners do not object to the participation of HBAKC and KCAR as *Amicus* but move to strike the twelve exhibits attached to the Declaration of Art Castle and any portions of the *Amicus* Brief and *Amicus* Motion based on those exhibits.

On June 6, 2006, the Board received Petitioners' Reply Brief (**KCRP Reply**) with 3 exhibits.

The Hearing on the Merits was convened on June 12, 2006, in the Training Center adjacent to the Board's Offices. Present for the Board were Board members Edward G.

McGuire, Margaret A. Pageler, and Bruce C. Laing,[26] Presiding Officer in this matter. Board law clerk Julie Taylor and Board extern Kris Hollingshead also attended. Petitioners were represented by Jerry Harless, with KCRP member Charlie Burrow in attendance. Respondent Kitsap County was represented by Deputy Prosecuting Attorney Shelley E. Kneip, accompanied by Scott Diener and Katrina Knutson, both planners with Kitsap County. Intervenor OPG Properties, LLC was represented by Charles Maduell of Davis Wright Tremaine, LLP. Art Castle, Executive Vice President of Home Builders Association of Kitsap County also attended. Eva P. Jankovits of Byers & Anderson, Inc., provided court reporting services.

The Hearing on the Merits was convened at approximately 10:00 a.m., and adjourned at approximately 12:35 p.m. The Board ordered a transcript of the proceedings.

At the Hearing on the Merits the Board noted that a portion of Appendix C of the Core Document was missing from the Core Document submittal. This material was requested by the Board at the Hearing on the Merits and submitted by Kitsap County on June 14, 2006.

The transcript of the Hearing on the Merits was received on June 19, 2006.

[26] Board member Bruce Laing's term of office expired on June 30, 2006, and was extended by Governor Gregoire to July 31, 2006.

APPENDIX B

☐ EXPEDITE
☒ No hearing set
☐ Hearing is set
Date: _____
Time: _____
Judge: Chris Wickham, Dept. No. 8

FILED
JUN 16 2006
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR THURSTON COUNTY

KITSAP COUNTY,

Petitioner,

-vs-

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; CITY OF BREMERTON; SUQUAMISH TRIBE; KITSAP CITIZENS FOR RURAL PROTECTION a/k/a KITSAP CITIZENS FOR RESPONSIBLE PLANNING; JERRY HARLESS; and PORT GAMBLE S'KLALLAM TRIBE;

Respondents,

and

MANKE LUMBER COMPANY; PETER E. OVERTON; LAURA OVERTON; DAVID OVERTON; OVERTON & ASSOCIATES; ALPINE EVERGREEN COMPANY; OLYMPIC PROPERTY GROUP/ POPE RESOURCES; and McCORMICK LAND COMPANY; and PORT OF BREMERTON;

Respondent Intervenors.

NO. 04-2-02138-1
05-2-01564-8
05-2-01678-4

ORDER

ORDER -- 1

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www.kitsapgov.com/pros

THE SUQUAMISH TRIBE,

Petitioner,

-vs-

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, KITSAP COUNTY, and McCORMICK LAND COMPANY,

Respondents.

KITSAP COUNTY,

Petitioner,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; FUTUREWISE, formerly known as 1000 FRIENDS OF WASHINGTON; KITSAP CITIZENS FOR RESPONSIBLE PLANNING; RICK BJARNSON, and JERRY HARLESS,

Respondents.

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FUTUREWISE, formerly known as 1000 FRIENDS OF WASHINGTON; KITSAP CITIZENS FOR RESPONSIBLE PLANNING; and JERRY HARLESS,

Petitioners,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an agency of the State of Washington; KITSAP COUNTY; and RICHARD BJARNSON,

Respondents.

THIS MATTER having come before the Court for bench trial on December 2, 2005 and the Court having heard argument on the matter, having read the briefs of the party, and having reviewed the administrative record in the case;

THE COURT having issued "Decision of the Court following Trial held December 2, 2005" Hereby:

(1) Affirms the Central Puget Sound Growth Management Hearings Board's decisions in *Bremerton, et al. v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order, dated August 9, 2004; "Order on Reconsideration" dated September 16, 2004, and *1000 Friends, et al. v. Kitsap County,* CPSGMHB Case No. 04-3-0031c, Final Decision and Order regarding the deadline for Kitsap County to complete its ten-year UGA update pursuant to RCW 36.70A.130(3);

(2) Affirms the Central Puget Sound Growth Management Hearings Board's decisions in *Bremerton, et al. v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order, dated August 9, 2004; and *1000 Friends, et al. v. Kitsap County,* CPSGMHB Case No. 04-3-0031c, Final

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Decision and Order regarding the necessity for Kitsap County to adopt and implement reasonable measures pursuant to RCW 36.70A.215(4);

(3) Reverses the Central Puget Sound Growth Management Hearings Board's decision in *1000 Friends, et al. v. Kitsap County,* CPSGMHB Case No. 04-3-0031c, Final Decision and Order regarding the Board's findings that the reasonable measures Kitsap County adopted in Resolution 158-2004 met the requirements of RCW 36.70A.215(4);

IT IS HEREBY ORDERED that the Central Puget Sound Growth Management Hearings Board decision in *1000 Friends, et al. v. Kitsap County,* CPSGMHB Case No. 04-3-0031c, is remanded for further hearings consistent with the Court's decision dated December 21, 2005.

DONE IN OPEN COURT this 16 day of June, 2006.

CHRIS WICKHAM

CHRIS WICKHAM, Judge

Presented by:

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

KITSAP COUNTY, Petitioner, vs.	)	
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, et al Respondents,	) Cause No.	04-2-02138-1 05-2-01564-8 05-2-01678-4
	) Decision of the Court following) Trial held December 2, 2005	
THE SUQUAMISH TRIBE, Petitioner vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, et al Respondent		
FUTUREWISE, et al Petitioners, vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, et al Respondents.		

This case consolidates multiple petitions for judicial review of two decisions of the Central Puget Sound Growth Management Hearings Board (the Board). The decisions for which petitioners sought review were a decision and order dated August 9 and September 16, 2004 (*Bremerton II*), and a decision and order dated June 28, 2005 (*1000 Friends*). The petitions essentially raise three issues: (1) did the Board err in determining that the County was required to conduct the 10 year review required by RCW

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36.70A.130(3) no later than December 1, 2004; (2) did the Board err in determining that the county was required to undertake reasonable measures to provide consistency as a result of the evaluation conducted pursuant to RCW 36.70A.215; and were the reasonable measures proposed by the County sufficient to satisfy the County's legal obligations under RCW 36.70A.215(4)? The Court will consider each issue in order.

(1) Did the Board err in determining that the County was required to conduct the 10 year review required by RCW 36.70A.130(3) no later than December 1, 2004?

RCW 36.70A.040 required the County to adopt a comprehensive plan and regulations consistent with chapter 36.70A no later than July 1, 1994 (subject to an extension). The plan and regulations were to be based upon data collected for a twenty year planning period. RCW 36.70A.130(3) requires a review of that plan be conducted within ten years. Because the County was unable to obtain Board approval of its original comprehensive plan until February, 1999, the County maintains that it was not required to undergo the required review until ten years from the date of Board approval. The other parties contend that the Board was correct in requiring review from the date that the plan should have been adopted.

The statute does not expressly provide for when the ten year period begins for a county that was late in obtaining approval of its plan. The parties have indicated that there is likely no legislative history on this particular issue and none has been presented. Therefore, the Court must look to the statute as a whole to understand the legislative intent behind this provision and thereby determine what the Legislature would have expected under these circumstances and what the County could have reasonably understand to be its duty.

In this regard, the other reviews scheduled in RCW 36.70A.130(4) for December, 2004 are helpful, but not conclusive. Subsections (1) and (3) of the statute expressly refer to those deadlines for other reviews, while subsection (2) does not. A court could infer from the existence of the express deadlines in (4) that they were intended to cover all evaluation requirements, particularly in light of the first sentence of (4), but the question remains why (2) would not have the express reference contained in (1) and (3). Did the Legislature intend to treat these requirements differently, or was it merely a drafting oversight? To answer this question, it is necessary to look to other sections of the statute. Of particular interest, is the manner in which the plans and their evaluation are tied into data

collected by the Office of Financial Management (OFM). This data is collected at regular intervals and includes twenty year projected population figures for the counties subject to the statute. Because the data is only collected at fixed intervals, to allow a county to reset the clock on its evaluation process would place the county out of sync with the OFM data forever. Plans and evaluations would then never be based upon the most current data. In fact, the County's plan, approved in 1999, was based on data issued in 1992 because of the delays in final approval of the plan. (See the Board's Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*) This delay has hindered evaluation of the plan and would continue to limit the effectiveness of the statute if it were perpetuated by the timetable proposed by the County. Since the statute gave the county a clear deadline for submission of the first plan and the ten year review was reasonably expected to occur within ten years of that date, and since selection of an alternate date would be inconsistent with the data collection and analysis part of the statute, the Court will affirm the Board's selection of December 1, 2004 as a deadline. Although the County originally argued that this date would present an extreme hardship on the County, the Court notes that at present the Legislature has extended the deadline by one year and the Board has provided an additional six month extension. This interpretation, then, does not appear to unfairly prejudice the County.

(2) Did the Board err in determining that reasonable measures were required to promote consistency as a result of the review conducted under RCW 36.70A.215?

In *Bremerton II*, the Board determined that the statute required the County to adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period. The Board had been presented with evidence that (1) there was an imbalance in growth between the urban and rural parts of the county; (2) the density in the urban growth area (UGA) was well below what was planned; (3) there was an excess of land in the UGA; and (4) the development density in the rural area was higher than planned. The County argues the Board's finding was not supported by the record and that the Board should not have looked at data related to the rural area. The County notes that RCW 36.70A.215(3) speaks only to development within the UGA. Futurewise and Harless argue that the evaluation required under 36.70A.215(3) could only be meaningful if the Board considers development within and without theUGA.

Petitioners Futurewise and Harless' argument makes sense. The goals of the Growth Management Act (GMA) include:

> (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
> (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development…
> (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities…

RCW 36.70A.020

The statute provides a scheme in which a UGA is created and the County is then expected to plan development and capital expenses such that housing density will be significantly higher in the UGA than outside it. Housing which would have been built outside the UGA should be re-directed within it. The Board must be able to evaluate what is happening within and without the UGA in order to make judgments as to whether the County is meeting the goals of the GMA. Support for this position is found in RCW 36.70A.215(2), which speaks to a review of activities "both within and outside of urban growth areas". The Board found in *Bremerton II* that "the County's BLR demonstrates inconsistencies between the development that has occurred in the County and what is envisioned by the GMA, and the County CPPs and Plan. The Act, as interpreted by this Board in FEARN, requires the County to implement reasonable measures no later than December 1, 2004." *Bremerton II*, p. 55. This Court affirms the Board's requirement for the County to take reasonable measures pursuant to RCW 36.70A.215(4).

(3) Were the Reasonable Measures taken by the County sufficient under the statute?

Upon receipt of the Board's order, the County passed a resolution (Resolution No. 158-2004) that listed various actions taken by the County which it considered to be reasonable measures under the statute. The Board in *1000 Friends* determined that the County had satisfied the requirements of RCW36.70A.215(4).

Futurewise and Harless have argued that the resolution adopted did not contain any new actions taken by the County, but was instead a summary of actions previously taken. The County does not disagree. Many of the items listed were adopted in 1998. Some were adopted as recently as 2003. But none of these actions were taken in response to the evaluation process set forth in RCW 36.70A.215. As a result, they cannot be considered to be "measures that are reasonably likely to increase consistency during the subsequent five-year period", as contemplated by the statute. The statute anticipates an evaluation based upon data collected and, where consistency is needed, remedial measures to be taken to improve consistency. Presenting a litany of prior measures taken when those measures have obviously not achieved the desired result is contrary to the intent of the statute, which is to adopt measures over time which will achieve certain goals. Harless presented to the Board evidence that these measures were ineffective and the County was unable to rebut that evidence. The Board had *clear and convincing evidence*, therefore, that the County's measures were not "reasonably likely to increase consistency." Employing the standard of review prescribed in *The Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn. 2d 224 (2005), this Court reverses the Board's finding that the measures were reasonable and will find that they did not meet the requirements of 36.70A.215(4). The case is remanded to the Board on this issue in order for the County to propose additional measures, based on the evaluation and data presented within and without the UGA, to satisfy the statute. Those measures could include such things as transfers of development rights, redirection of capital resources, rural cluster developments, and others. The Court notes that the County has already committed to developing additional reasonable measures in Resolution No. 158-2004.

All parties have acknowledged the challenges presented in meeting the requirements of the Growth Management Act for the County. Prior to the adoption of the GMA, many small lots had been approved and the rights of those owners have become vested. This Court recognizes the rights of those property owners, as do all the parties before this Court. The existence of those rights, however, does not render the goals of the GMA unattainable. The Legislature was aware of those property rights when the GMA was enacted, and all courts which have dealt with these issues have honored them. What the GMA expected and what is required under RCW 36.70A.215 is that counties use varying methods in working with developers, property owners, and communities to encourage urban

development within the UGA, and rural development without it. This decision merely encourages the County to continue the process it has already begun.

The decision in *Bremerton II* is affirmed: the decision in *1000 Friends* is reversed and remanded for further hearings consistent with this decision.

Dated This 21 Day of December, 2005

Chris Wickham, Judge